IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971 No.

ROBERT J. BEAUDRY,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF WISCONSIN

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To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

Robert J. Beaudry, respectfully petitions this Honorable Court for a Writ of Certiorari to review the Judgment of the Supreme Court of the State of Wisconsin entered in the above entitled case on December 2, 1971 and re-affirmed on re-hearing by order filed on February 1, 1972.

OPINIONS DELIVERED IN COURTS BELOW

This matter involves an original action in the Supreme Court of the State of Wisconsin upon the complaint of the Board of State Bar Commissioners of the State of Wisconsin seeking to discipline petitioner herein, an attorney licensed to practice his profession in the State of Wisconsin. The opinion of the trial referee appointed by the Wisconsin Supreme Court to take testimony and make a recommendation in this bar disciplinary case is not reported; the same is printed in App. A appended to this petition. The PER CURIAM decision and mandate of the Wisconsin Supreme Court in this case is officially reported in 53 Wis 2nd 148 and unofficially in 191 NW 2nd 842; the same is printed in App. B appended to this petition. Petitioner's motion for re-hearing was denied by order of the Wisconsin Supreme Court made and filed February 1, 1972; the same is printed in App. C appended to this petition.

JURISDICTIONAL STATEMENT

The date of the Judgment of the Wisconsin Supreme Court sought to be reviewed and the time of its entry is December 2, 1971. Said Judgment of the Wisconsin Supreme Court is a final judgment of the highest court of the State in which a decision in this case could be had. The statutory provision believed to confer on this Court jurisdiction to review the Judgment in question is 28 U. S. C. sec. 1257 (3). The federal questions presented in this petition appeared for the first time in the Opinion and Judgment of the Wisconsin Supreme Court made and entered in this original action in the Wisconsin Supreme Court. Your petitioner responded to the

federal question so raised in his Motion for Re-hearing and his Brief in Support thereof. Re-hearing was denied on February 1, 1972 without opinion.

QUESTIONS PRESENTED FOR REVIEW

(1) Is the standard utilized by the Wisconsin Supreme Court by which defendant's guilt or professional misconduct is measured vague and uncertain?

(2) Does a presumption utilized by the Wisconsin Supreme Court to the effect that a lawyer cannot function in a competent manner and render independent professional service because he has been requested to render professional services by a lawyer-friend deprive petitioner of equal protection under the law, and is such presumption violative of petitioner's rights to due process of law?

CONSTITUTIONAL PROVISION

The constitutional provision relied upon by petitioner is as follows:

Section 1, XIV Amendment, United States Constitution:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner herein has been actively engaged in the practice of law in the State of Wisconsin since 1949. In this case, the Supreme Court of Wisconsin entered a Judgment severely reprimanding and censoring petitioner for what it described as unprofessional conduct in failing in what the Wisconsin Supreme Court described as his duty as an attorney who selects another attorney to draw a will for his client in which he is to be a beneficiary, to pick out as competent and independent an attorney as the client would pick out.

The report of the referee includes the following determinations: the evidence introduced has been sufficient to overcome the inference of actual undue influence; the will as written, embodied the wishes of the testatrix at the time of the execution of the will; on the evidence adduced at the hearing, I do not consider the will unnatural for one of the character of the testatrix; as to the actual mental condition of the testatrix, I would have to find on the evidence that she apparently was mentally competent; it would be my opinion that the testatrix was sufficiently aware of the facts which should be considered by a person about to dispose of her property to make a valid will; Beaudry had no duty to convince the testatrix that she should leave her property to relatives; that a person with testatrix's insistence of having her own way, it would undoubtedly have been futile.

The opinion of the Wisconsin Supreme Court did not in any fashion alter the aforementioned determinations of the referee appointed by it to the effect that the will of the testatrix was made when

she was competent and was not subjected to undue influence and to the effect that the will did represent the wishes of the testatrix.

The testatrix had been a client of petitioner herein for some period of time prior to the execution of the will involved in this matter. She was over 70 years of age, had been a resident of a nursing home for some period of time and on the day before the will was executed, she suffered a stroke and was hospitalized. Petitioner was informed that his client was in the hospital in a serious condition. He went to the hospital where he inquired as to whether his client wanted to make a will and as to whom the beneficiary was to be. On previous occasions, the lady had told petitioner that she wanted to make a will leaving her property to petitioner. Petitioner left the hospital and went to the Milwaukee County Courthouse to consult with his former law partner, a Judge of the Probate Division of the County Court and with an assistant to the Judge whom petitioner considered an authority on probate law of Wisconsin. Petitioner contacted an attorney with whom he was friendly after unsuccessfully attempting to contact other attorneys of his acquaintance. He arranged to pick up the attorney and his secretary, telling the other attorney that he would like to have drafted a will for a person for the reason that petitioner thought that he might be included in the will as a beneficiary. On the way to the hospital, petitioner advised the other attorney that the woman involved in the making of the will could not read or write.

The two attorneys and the secretary entered the hospital room of the woman involved. Petitioner introduced the other attorney and his secretary to the lady and petitioner then left the hospital and

returned to his office. He consulted with several clients at his office before returning to the hospital according to prearrangement to furnish the other attorney and his secretary transportation back to their office.

The testimony of the attorney who prepared the will reads as follows: His sister, Benedetta Balistrieri, and Mr. Beaudry entered Mrs. Komarr's hospital room with him. One of the two women in the room was introduced to him as Mrs. Komarr. Mr. Beaudry said: This is Joe Balistrieri, an attorney; he is going to talk to you. Then Mr. Beaudry left. He reintroduced himself as Joe Balistrieri, an attorney, and asked her if she wished to have her Will written; she said: yes. There might have been some other conversation. He asked her if she had any land, real estate; she said: yes; he asked her if she had any money; she said: yes. She said she had no husband, but did have a son. He asked her if she had anything she wanted to leave and who she wanted it left to; she said: Mr. Beaudry. He asked her if she was sure, if she had been promised anything or if she had been influenced in any way; she said: no. He repeatedly asked her if that is what she wanted. He wrote out Paragraph I of the Will and read it to her and asked her if that was her wish; she said: yes. He asked her who she wanted to be executor and she said Mr. Beaudry; then he wrote out Paragraph II and read it to her; he asked her if it was all right with her and she said: yes; then he asked her again if she was sure she wanted to leave her property to Mr. Beaudry; she said: yes. He believed that at this time he made mention of her son; she said: no; she wanted to leave everything to Mr. Beaudry. He asked her again if she was sure, and she said: yes. After he wrote out

Paragraph III, he read it to her and asked her if she was sure that that is what she wanted; she said: yes; and then he got into the area of her son; he asked his name and where he was living; he asked her if she was sure that she didn't want to leave anything; if that is what she wanted; she said: yes. Then he wrote Paragraph IV and read it to her; he reminded her again that this would leave nothing to her son and asked her whether she was sure; was anybody influencing her; she said: no, this is what she wanted. She told him two or three times what her son's name was; she said Joe Vargo. He read the paragraphs word for word, exactly as they appeared on the paper; when he came to the name of her son, he read it as it appears on Exhibit 1. She repeated the name; she said: Joe, Joe. At the point where he arrived at the name of Joe Vargo, she said: Joe, Joe. He read as he had written, Joe Vargo; Mrs. Komarr was speaking very low, and it was difficult to understand her because she had no teeth and spoke with an accent; she also seemed to have a partial facial paralysis. Then he read Paragraph V and told her about giving certain powers to her executor; he asked her if that was all right and that if that is what she would like him to do and she said: yes; he asked her if she wanted any changes, did she understand it and did she want to add anything. She said: no. Then he read the whole Will back to her to the very end, asking again if she wanted any changes; at that point the attestation clause was not read; he read the entire first two pages and asked her if that is what she wanted; she said: yes; he asked her: are you satisfied; she said: yes. He asked her: Do you want any changes; she said: no. He drew a line; he wrote her name underneath, and asked her to sign the document; he put the document in front of her, and gave her his pen that he had been using;

she took it in her hand. He put his hand on her hand, and she scratched two X's as they appear on the document; her hand held the pen; he just had his hand on hers; she caused the movements to be made with the pen that made the marks on the paper. Then he wrote page 3, and asked Mrs. Komarr is she was watching and asked his sister to sign and asked Mrs. Komarr whether she saw his sister sign; he asked his sister and Mrs. Komarr to watch and he signed at the bottom of page 3. Mrs. Komarr made the marks at the bottom of page 2 on the line above her name in his presence and in the presence of his sister. His sister signed page 3 in his presence and that of Mrs. Komarr; he signed his name on page 3 in the presence of Mrs. Komarr and his sister. After they signed, there was a brief conversation as to Mrs. Komarr's comfort, and Mr. Balistrieri and his sister said goodbye and left.

The Board of Bar Commissioners of the State of Wisconsin caused a complaint to be issued charging petitioner herein with professional misconduct. The Supreme Court of the State of Wisconsin appointed a referee to conduct a hearing for the purpose of taking evidence from the complainant and petitioner relating to the charges of misconduct. The referee caused a report to be filed, a copy of which is appended to this petition and appears in Appendix A. Thereafter, the Supreme Court of the State of Wisconsin heard oral arguments from the parties involved and thereafter caused its decision to be filed, a copy of which decision is appended hereto as Appendix B. Petitioner herein moved the Supreme Court of Wisconsin for reconsideration of its decision and for a re-hearing of the matter. It was in the brief caused to be filed on behalf of petitioner herein on

his motion for re-hearing that the federal questions sought to be reviewed herein were raised. In light of the fact that this action was an original action in the Supreme Court of Wisconsin, the federal questions raised herein did not appear until the Supreme Court of Wisconsin rendered its decision in this matter. The federal questions raised herein were specifically raised in petitioner's brief in support of his motion for a re-hearing in substantially the same language as they are raised herein.

REASONS FOR ALLOWANCE OF THE WRIT

INTRODUCTION

Lawyers are not relegated to a watered-down version of constitutional rights. Garrity v New Jersey, 385 US 493. The State cannot exclude a person from the practice of law in a manner or for reasons that contravene the due process of equal protection clauses of the Fourteenth Amendment. Schware v Board of Bar Examiners 353 U S 232.

It is recognized that this case presents a challenge to important prerogatives of the Wisconsin Supreme Court, involving regulation of the attorneys who practice in the courts of Wisconsin, and that the Wisconsin Court's power in this area has even been characterized, by the State, as "plenary" in dimension. But even such prerogatives and such power do not permit invasions of the most fundamental rights secured to individuals under the United States Constitution. Under our system of government, review by this Court of the powers of the Wisconsin Supreme Court to regulate attorneys stands on no different footing than such review of the power of a legislature, or an executive, to

regulate individuals, when the questions presented for review involve the Constitution of the United States. See, e. g., Spevack v Klein 385 U S 511.

I. THE STANDARD BY WHICH DEFENDANT'S GUILT WAS MEASURED IS VAGUE AND UNCERTAIN, IF NOT READ IN THE LIGHT THAT THE WILL AS WRITTEN DID EMBODY THE WISHES OF THE TESTATRIX.

Statutes affecting personal and property rights will be deemed invalid under due process of law when they are so vague and uncertain that men of common intelligence must necessarily guess at their meaning. Cramp v. Board of Public Instruction (1961), 368 U. S. 278. "A statute," says the United States Supreme Court, "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v. General Constr. Co. (1926), 269 U. S. 385, 391. See also Volume 1, Antieau: Modern Constitutional Law, Section 7:20 page 553 (1969).

Petitioner respectfully submits that a rule or determination of the Wisconsin Supreme Court relating to conduct of an attorney has the same force and effect as a legislative enactment, and as a consequence, since such a rule affects the substantial personal and property rights of an attorney, it must be deemed invalid under due process of law if it is vague and uncertain.

The Wisconsin Supreme Court held in this case that it is the duty of an attorney who selects another attorney to draw a will for his client in which he is

to be a beneficiary to pick out as competent and as independent an attorney as the client would pick out. In this case, the Referee specifically found that the attorney selected was agreeable to the testatrix and that the will prepared by such an attorney in fact represented the wishes and decisions of the testatrix. The Supreme Court of Wisconsin did not change the findings of the Referee as regards the determinations of the Referee that the will as written embodied testatrix's wishes at the time of the execution of the will, or that the attorney who drew the will was acceptable to the testatrix; and did not alter the determinations of the Referee that the will was not unnatural and that petitioner in his contacts with testatrix made no efforts to impose his wishes upon her, and that if efforts had been made to try to convince testatrix that someone else deserved the inheritance, with a person of testatrix's insistence on having her own way it would undoubtedly have been futile.

Petitioner respectfully submits that he fulfilled his duty in selecting as competent and as independent an attorney as his client would pick out, or if it can be said that he did not do so, then the rule requiring doing the act specified is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

II. A PRESUMPTION THAT A LAWYER CANNOT FUNCTION IN A COMPETENT MANNER AND RENDER INDEPENDENT PROFESSIONAL SERVICE BECAUSE HE HAS BEEN REQUESTED TO RENDER PROFESSIONAL SERVICE BY A LAWYER-FRIEND DEPRIVES PETITIONER OF PROTECTION UNDER THE LAW AND VIOLATES HIS RIGHTS TO DUE PROCESS OF LAW.

In many parts of Wisconsin it would be almost impossible for one lawyer not to have some kind of

friendly relationship with the other lawyers for miles and miles around. If the will in question had been drawn in one of those areas, it would have been inevitable that the draftman selected would have had to have some degree of friendship to the lawyer beneficiary. The will here was drawn in a metropolitan area; to say that because the draftman was a friend of the beneficiary a presumption was created to the effect that he could not function as independently as some other lawyer in the community would result in an unfair classification of lawyers and deprive the petitioner of equal protection under the law, and would violate petitioner's right to due process of law.

The Supreme Court of Wisconsin in its opinion states: when the lawyer selected by a proposed lawyer-beneficiary is a close friend, the rule requires that attorney to meet all the tests for an independent legal attorney selected solely and exclusively by the testator himself. Substantial emphasis apparently was placed on the friendship relationship between the two attorneys involved, and it appears that a presumption was raised that by reason of such relationship, the attorney who drew the will did not render competent and independent professional service to the client.

In Speiser v Randall 357 U S 513, this Court discusses the proposition that it is within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion and in raising presumptions, unless in so doing, it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. Snyder v Massachusetts 291 US 97, 105.

Petitioner respectfully submits that the presumption raised by the Wisconsin Supreme Court is violative of petitioner's rights to due process of law.

Further, there is an underlying constitutional requirement of equality in that all persons in like circumstances and like conditions must be treated alike, both as to privileges conferred and as to liabilities or burdens imposed. The general rule as to classification in the imposition of burdens is that no one may be subject to any greater burdens and charges than are imposed on others in the same calling or in like circumstances. Truax v Corrigan, 257 U S 312; Cotting v Kansas City Stock Yards Co. (Cotting v Godard) 183 U S 79; Yick Wo v Hopkins, 118 U S 356. See also 16 Am Jr 2nd, Constitutional Law sec. 528.

Since a lawyer in a less populated area in the State of Wisconsin would almost necessarily be required to refer a client to some other lawyer with whom he had a close relationship, it would be unfair to say that a lawyer in a metropolitan area who referred a client to an attorney who happened to be a friend of his would suffer the burden of a presumption that such attorney could not function in a competent and independent professional manner.

CONCLUSION

For the foregoing reasons, it is submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

ROLAND J. STEINLE
Attorney for Petitioner

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APPENDIX A

REPORT OF REFEREE
(Formal Parts Omitted)

TO THE HONORABLE SUPREME COURT OF THE STATE OF WISCONSIN:

Pursuant to an order of this Court, made and entered on the first day of September, 1970, appointing the undersigned as referee in the above entitled case, to try the issues and report his findings of fact and recommendations to the Court, I, the undersigned, as such referee, report that before proceeding with the matter I took and filed my oath as such referee; on September 12, 1970, a pretrial conference was conducted by me at Madison, attended by Mr. Rudolph P. Regez and Mr. Robert H. Bichler, attorneys for the plaintiff, and the defendant in person and his attorneys, Mr. Roland J. Steinle, Jr., and Mr. Stanley F. Hack; pursuant to notice personally served on the defendant on September 12, 1970, a formal hearing in this matter was conducted at Milwaukee on November 18, 19, 20, 23, 24 and 25, 1970, at which the plaintiff was represented by Attorneys Rudolph P. Regez and Robert H. Bichler, and the defendant, being personally present, was represented by Attorneys Roland J. Steinle, Jr., and Stanley F. Hack.

That after hearing all of the evidence presented by the parties, and considering the briefs submitted by the parties and being fully advised in the premises, and all proceedings herein having been transcribed by the official reporter, and said transcript and an abridgment thereof, together with all the exhibits admitted in evidence being herewith filed with the court, the following findings of fact

and recommendations are hereby made and respectfully submitted to the Court.

The complaint and answer filed herein sufficiently delineate the issues in this matter, and in the interest of brevity I will not reiterate them.

ROBERT J. BEAUDRY

The defendant, Robert J. Beaudry, was graduated from Marquette University Law School in 1949, following which he was admitted to the bar and has practiced law continuously since that time, with his office in the City of West Allis, Milwaukee County. There is no evidence as to his age, birthdate or birthplace, but the evidence shows that he has been married for twenty-eight years and has a family of eleven children, most of them still dependent on him for support.

EVELYN KOMARR

I think that at this point a biographical sketch of Evelyn Komarr, a central character in these proceedings, would be in order.

Evelyn Komarr was born Evelyn Vargo in April, 1893, in a part of Austro-Hungary now a part of Yugoslavia. At the age of seventeen she emigrated to the United States, coming directly to Milwaukee. She did factory work in Milwaukee for a few months and then embarked on her lifetime career as a prostitute. From that time on she engaged in no other occupation.

Apparently, she did not confine her activities to Milwaukee, since she at times commuted to

Cleveland, Detroit, Chicago and Springfield, and was imprisoned in Virginia for two years.

While on an involuntary vacation of two years in a Chicago jail, she gave birth to a child named Theodore Vargo, on March 14, 1914. In July of 1914, after she had finished her jail sentence, she brought this boy to Milwaukee and left him with her brother's wife, now known as Mary Kramarich. The boy was then over three months old, and he lived with his aunt, Mary Kramarich, until he was eighteen months of age.

During that period Evelyn "worked on a boat." When the boy was two and a half years old, which would be about September of 1916, Evelyn married one Charlie Smith.

After keeping the boy for eighteen months, Mary called Evelyn and told her to come and get Theodore because she, Mary Kramarich, was moving to Ohio.

Evelyn responded by picking up Theodore and placing him in a Milwaukee orphanage, where he lived about a year. Evelyn never visited him at the orphanage, although Mary Kramarich and Evelyn's sister, Theresa Kapitanich (Kapetonivich) did so. Evelyn and her sister, Theresa Kapitanich, finally took the boy from the orphanage and he lived with Theresa Kapitanich and her husband Marko. This couple had been married about two and a half or three years when they adopted Theodore, who was then aged six.

This came about after John and Mary Kramarich returned to Milwaukee, and Marko and Theresa Kapitanich and the boy Theodore came to live with

them. Evelyn came to the house and said that she didn't want Theodore. Adoption proceedings were commenced, and resulted in the adoption of Theodore by Marko and Theresa Kapitanich, on March 26, 1920. At the adoption hearing the Kapitaniches demanded of Evelyn that she pay them $500.00 for the past care of the boy. This was finally settled later by the payment of $250.00 by Evelyn and her giving them a note for $250.00.

Theresa Kapitanich later took the boy, left her husband and ran away to Cleveland with another man. In Cleveland she had him baptized and given the name of George Kapitanich, and thereafter he was known as George rather than Theodore.

Apparently, Evelyn kept some contact with her former son, because he occasionally commuted with her on her business trips between Milwaukee, Cleveland, Detroit and Springfield.

Evelyn, having reached retirement age, married Bruno Komarr. They continued to live in Milwaukee. George (Theodore) Kapitanich somewhere along the line assumed the name of George Vargo, married and resided in Royal Oak, Michigan, a suburb of Detroit, with his family. Sometime, apparently in early 1963, Bruno and Evelyn Komarr visited George at his home, but were driven out at midnight by George, who claimed they were drunk, and they drove back to Milwaukee.

Bruno Komarr died in Milwaukee after a long bout with tuberculosis, and Evelyn had a severe change of personality after his death, and was committed to a Milwaukee County Institution for mental diseases on June 19, 1964. She adjusted to the routine and on December 7, 1964, she was

conditionally released to George Vargo, who took her to live with him in his home in Royal Oak.

On July 2, 1964, letters of guardianship were issued to George Vargo by the Milwaukee County Court. On February 7, 1965, the guardianship was terminated and a conservatorship established with George Vargo as conservator at the request of Evelyn Komarr.

The arrangement under which Mrs. Komarr was living in Royal Oak was unsatisfactory to her, and she left, returned to Milwaukee, and entered the Mt. Carmel Nursing Home on August 7, 1965.

She complained that George Vargo as her conservator was too penurious with her, and that he did not call to see her as often as she thought he should. On September 21, 1967, she petitioned the court for a change of conservator, asking for the appointment of Robert Beaudry, whom she had come to know when he represented her in the probate of her husband's will, and in two or three lawsuits in which she had become involved. This change was accomplished, and Mr. Beaudry was appointed and duly qualified as conservator of her estate.

Mrs. Komarr lived at the nursing home from August 7, 1965 until March 17, 1967, when she suffered a stroke and was taken to Misericordia Hospital. Her left leg and arm were Flaccid, and her lip drooped on the left side. She was released from the hospital on May 6, 1968, and returned to the nursing home, where she stayed until May 24, 1968, when she was returned to the hospital, where she died on July 8, 1968, at the age of 75.

It should be mentioned that Evelyn Komarr was completely illiterate, being unable to even write her own name.

Apparently Mrs. Komarr was never able to lay away much money, for it was stipulated that all of the property in her estate, approximately $50,000.00 came to her through the estate of her husband, Bruno Komarr.

THE FACTS

We are concerned here, not with the validity of the alleged will, but with whether or not Mr. Veaudry was guilty of unprofessional conduct in the manner in which he procured the drafting and execution of the instrument. Insofar as the validity of the will is concerned, this has already been determined by the Court. Estate of Komarr (1969), 46 Wis. 2d 230. In the opinion of the Court, authored by Mr. Justice Hanley, the door is left ajar for the introduction of additional evidence to overcome the inference of undue influence on the part of Attorney Beaudry:

> ". . . This court must determine whether the proponent Beaudry has sufficiently gone forward with the evidence.
>
> "As stated in Will of Cooper, supra,
>
> "'One need not contradict the evidentiary facts giving rise to the inference but may introduce such facts as would permit the rejection of the inference of undue influence.'"
>
> "We think that when the evidence is scrutinized in the light of previous decisions of this court concerning fiduciary relationships, such evidence

tending to negate the apparent unnaturalness of the instant will is insufficient to overcome the inference of undue influence on the part of Attorney Beaudry."

The events connected with the execution of the will must be closely scrutinized under the circumstances here present. Immediately upon receiving word that Mrs. Komarr was in the hospital in a serious condition, Mr. Beaudry went to his office, picked up his secretary, Mrs. Morris, and rushed to the hospital. After staying only long enough to pass the time of day, and inquiring as to whether she wanted to make a will and as to whom the beneficiary was to be, he went to the courthouse to consult with his former law partner, the Honorable Michael Sullivan, Judge of the probate branch of the county court, and called into consultation Mr. Ralph Chmurski, an assistant to Judge Sullivan, whom he testified he considers the foremost authority on probate law in the state.

After the situation was explained, Mr. Beaudry was advised by both of his consultants to have nothing to do with the execution of the will, and that the proper thing to do was to have the job done, if it was to be done, by an attorney of her own choosing. It was only as a possible alternative in case Mr. Beaudry felt it necessary that he provide the scrivener that he absent himself from the hospital. He then inquired as to whether Judge Sullivan could act as a witness to such a will, and was told that it would be improper.

He then returned to his office and called the office of Mr. Roland J. Steinle, Jr., who had acted as his attorney at one time in a controversy over

the dissolution of a legal partnership. Not being able to find Mr. Steinle or any other attorney in the Steinle office, he called Mr. Joseph P. Balistrieri, a young attorney of limited experience, who had been in practice only a few years; took Balistrieri and his sister, who was also Mr. Balistrieri's secretary, to the hospital after telling Mr. Balistrieri that he was to come prepared with a pad of paper and a pen to make a will for a woman who was in the hospital. On the way to the hospital he told Mr. Balistrieri that the woman wanted to make Mr. Beaudry the sole beneficiary, that Mrs. Komarr could not read or write, and that she had a son whom she wished to disinherit. He made no mention of the fact that he was conservator of her estate.

Mr. Beaudry took the Balistrieris to the hospital, introduced them to Mrs. Komarr and left the hospital, returning to his office. He consulted with several clients before returning to the hospital according to prearrangement to furnish the Balistrieris transportation back to their office.

The Balistrieris were waiting in the waiting room when Mr. Beaudry returned, and they immediately came out to the car. Even before entering the car Mr. Balistrieri handed the will to Mr. Beaudry, who immediately examined it, and thereafter kept it in his possession until it was offered for probate. While they were returning from the hospital Mr. Beaudry told Mr. Balistrieri for the first time that he was the conservator of Mrs. Komarr's estate. The fact that the will was delivered to Mr. Beaudry, apparently without any discussion with Mrs. Komarr as to who should keep it, is some indication that Mr. Balistrieri

considered that he was employed by Mr. Beaudry. At the direction of Mr. Beaudry, Mr. Balistrieri later rendered a statement to Mr. Beaudry as conservator for his fees in drafting the will. The conservatorship was later closed, leaving this as the only unpaid bill, and the bill is still unpaid.

It is obvious that Mr. Beaudry did not visit Judge Sullivan and Mr. Chmurski for the purpose of finding out whether it would be proper for him to draft the will and preside at its execution. His testimony is that he had previously told Mrs. Komarr that he could not draw such a will, and that she should leave her name at the desk of the nursing home, that lawyers were frequent visitors at the institution, and that she should have one of them take care of the matter. This leaves only two possible reasons for his call at the courthouse; to learn whether under any circumstances a conservator could be a beneficiary under a will, a question which nearly any layman could answer in the affirmative, and to see if he could persuade Judge Sullivan to lend his prestige to the execution by acting as an attesting witness.

The attempt to reach Mr. Steinle, and his choice of Mr. Balistrieri as the scrivener indicates that he was looking for someone whom he could trust to protect his interests. His choice of Mr. Balistrieri surely was not dictated by any great proficiency the latter had in drawing wills. Mr. Balistrieri was a young practitioner who had drawn only four or five wills, all of them simple ones, usually leaving all of the property to a spouse.

It may be properly presumed that Mr. Balistrieri had no large or lucrative law practice. He

was practicing alone and was probably practicing more patience than law at that time. He would be grateful for any small crumbs which might fall from the tables of busier lawyers. Some of these small matters came to him from Mr. Beaudry, who had also acted as his preceptor and arranged for Mr. Balistrieri to accompany him to a tax school in Chicago. Mr. Balistrieri had also acted as an attorney for Mr. Beaudry in the dissolution of the latter's legal partnership, although Mr. Steinle was apparently called in when the going got rough. Mr. Beaudry had been a friend of Joseph Balistrieri's for some years, and was a guest at his graduation party.

This relationship between the defendant and Mr. Balistrieri leads naturally to the question: In drafting and procuring the execution of the will, was Balistrieri acting as the attorney for Mrs. Komarr or for Mr. Beaudry?

It will be noted that during this interview with Mrs. Komarr, Balistrieri made no effort to probe the reason why she wished to disinherit her son, nor to inquire as to other relatives to whom she might wish to leave bequests. He apparently accepted without question the statement which he claims she made that she wished Mr. Beaudry to have everything, since he had been preconditioned to that response by the information given him by Mr. Beaudry.

It is my opinion that the adage qui facit per alium, facit per se applied under the circumstances, and that Mr. Balistrieri was obviously acting as the agent of Mr. Beaudry. who was eagerly waiting in the wings for the little drama to be completed.

What seems to be unseemly haste on the part of Mr. Beaudry to get the will executed might be explained on the basis that it would be the duty of any attorney who knows that his client wishes to make a will to drop everything and try to get the will drafted and executed as quickly as possible when the client appears to be in extremis.

The method in which he went about arranging for the drafting and execution of the instrument, however, lends credence to the theory that he was at that time more concerned with his personal interest than in the desire of Mrs. Komarr to have her will executed.

Mr. Beaudry had at least three alternatives to the course he chose to pursue. (1) He could have left it up to Mrs. Komarr to choose her own attorney. An answer to this could well be that she wished no one but Mr. Beaudry to draw her will, and that her innate stubborness would not permit her to accept another lawyer. However, she did accept Balistrieri. Another answer might be that she knew no other attorneys, which would be rather unlikely in the case of a woman who had spent fifty years in Milwaukee. (2) He could have left a request at the desk as he suggested doing at the nursing home, and the manager of the institution would have arranged for a lawyer to call on her. (3) He could have requested the Referral Service of the Milwaukee Bar Association to assign a lawyer.

It is not unreasonable to conclude that none of these alternatives was acceptable to him, since he wanted to supervise the matter.

Much evidence was adduced in the course of this hearing as to the mental condition of Evelyn

Komarr over a period of years, and particularly with reference to the time of the alleged execution of her will. It appears to me that, except as hereinafter noted, her actual mental capacity at that time is irrevelant to the issues to be decided in this matter. This matter in no way concerns the validity of the alleged will; that has already been decided. We are concerned only with the mental condition of Mrs. Komarr as it was known to, or should have been known to, or learned by the defendant, since this would directly bear upon the issue of the unethical conduct with which he is charged.

Insofar as the medical profession is concerned, Mr. Beaudry is a layman, and as such can hardly be expected to know, and probably not to understand, all the abstruse and technical dichotomies concerning senile psychosis and cerebral arteriosclerosis explained to us by the psychiatric experts and the medical textbooks. He must, however, be considered to know matters of common knowledge as to the effects of a stroke, such as the fact that following such an accident the patient must have a systemic shock causing physical weakness. He must be held to have recognized such symptoms of change as there may have been as were apparent to him, not as a casual observer or "through a glass darkly", but as "a very dear friend", as he described himself, who would immeidately notice any changes which took place in her mental condition, either of an instantaneous nature following the cerebro vascular accident, or in the way of gradual deterioration over the period of their acquaintanceship.

I think that it would necessarily follow that in his capacity of conservator of her estate, before

he made arrangements for the drafting of her will, it would be his duty to satisfy himself of her competence, and that he could not shift this responsibility in toto to the scrivener, who had never met Mrs. Komarr, and could not compare or contrast her condition on the afternoon of March 18, 1968, with her normal condition. This would be especially true in the case of a woman of the character and life experiences of Mrs. Komarr, which was something entirely foreign to the experience of the scrivener.

I believe that it is clear that Mr. Beaudry made no inquiries which would indicate that Mrs. Komarr was in a mental condition to make a will. He merely asked her how she was feeling, whether she wanted to make a will, and to whom she wished her property to go. True, he might have been criticized had he led her into a discussion as to the beneficiary of her will, but there were many other subjects which he could have discussed with her, such as the nature and extent of her property, whether she remembered that she had any other relatives than George, which would have thrown some light on her capacity. Instead, after a few perfunctory questions, he bolted from the room to arrange for the drafting and execution of the will.

As to what was her actual mental capacity, I would have to find on the evidence, much of which was not presented at the will hearing, that she apparently was mentally competent. I refer in particular to the notes made on her chart by three physicians. Dr. Callan noted on March 17, 1968 "she responds to questioning and is apparently alert although her speech is slurred." Dr. Tucker's note on the same day, "She responds appropriately

to questions." And the note of Dr. Gussetta on March 18, "Conscious but has slurred speech."

I would be inclined to rely more on the empirical decisions of these trained observers than on the theoretical opinions of psychiatrists and textbooks which attempt to place persons in categories which are rarely sharply defined and often tend to overlap and confuse. It would be my opinion that Evelyn Komarr was sufficiently aware of the factors which should be considered by a person about to dispose of her property to make a valid will.

The question of whether Mrs. Komarr made a deliberate choice in naming Robert Beaudry as the sole beneficiary of her will, and whether that choice was an unnatural one, must be approached, I think, from the viewpoint of her character as shown by her life history.

As a very amateur psychologist, after studying the voluminous testimony as to her character as shown by her life history, I would be of the opinion that the dominant characteristic of Evelyn Komarr was selfishness. She was essentially a selfish and egocentric person. Throughout her life she lived only for herself with no regard for others, either relatives or acquaintances, except when she expected some return. Throughout the evidence there is not a scintilla of evidence that she ever did a kindness for anyone.

She left home at an early age, and although it may be presumed that she was making a good living since she wore fine clothes, there is no suggestion that she ever gave birthday or Christmas gifts to anyone. She left her baby with others without offering to pay for the care of the boy, and finally

said she did not want him. She paid no attention to him after the adoption until she needed help when she was to be released from the mental institution, when she got him to assume the duties of guardian.

At the nursing home she insisted on getting her way regardless of the annoyance this caused to her room mates. I view her episodes of tantrums in the nursing home as "acting out" in attempts to gain attention. When George Vargo did not keep her supplied with money with which to buy things she wanted she vilified and condemned him. Her marriage to Bruno Komarr fits this pattern. Bruno had always been a hard worker and a frugal, saving man who had accumulated a sizable estate. This would provide for her the economic security which she had not provided for her own old age. Throughout her lifetime she had never given her body for love, but sold her favors, and there is no reason to think that she was less pragmatic in her approach to marriage.

She managed to stay with Geroge Vargo for several months with no expense except the hiring of Mrs. Vargo's daughter as a babysitter, and she resented that expenditure.

When she returned to Milwaukee and found that Vargo, as conservator was not furnishing her enough money to live in the style to which she would like to become accustomed, she turned to Beaudry and had him replace Vargo. In an effort to keep her new conservator generous with her money, she put out the bait of an inheritance. Whether she really intended to keep her word or not will never be known, but she delayed making the will of which she spoke until she thought she might be dying. At

that point she was bitter about George Vargo, and had had no close ties with any of her other relatives, and after all, she could always change her will if she recovered. That she neglected to do so might be attributed to the natural disinclination most people have to making a will, or it might have been a way to stay in the driver's seat in her demands on Beaudry. In any event, on the evidence adduced on the hearing I do not consider the will unnatural for one of Evelyn Komarr's character.

Neither do I find any evidence of undue influence actually exercised on the part of Mr. Beaudry. He had no duty to try to convince Mrs. Komarr that George Vargo deserved the inheritance, nor that she should leave her property to other relatives. This was no part of his duty as conservator or attorney, and with a person of Mrs. Komarr's insistence on having her own way it would undoubtedly have been futile.

Testimony was introduced that Mrs. Komarr considered making the Little Sisters of the Poor the object of her bounty, but in the context in which the conversation about this possibility occurred, it is obvious that she had no thought of leaving her property to that organization as a bequest, but rather of making a transfer of all her property in return for her support and care for the rest of her life. This was not acceptable to her for the reason that she felt that if she should not like the care she received at one of the institutions run by that organization she could not leave and get her property back.

Should the conduct of Mr. Beaudry be judged by the Court to amount to the exercise of undue influence in procuring the naming of himself as the

sole beneficiary, then I suggest that it should be judged in the light of his belief at the time of the execution of the will that George Vargo was Mrs. Komarr's sole heir at law, since the fact of the adoption was not discovered until after the will contest.

I attach no particular significance to the fact that Mr. Beaudry had Mrs. Komarr as a Christmas guest at his home. The evidence of Mrs. Ann Beaudry is to the effect that he frequently had clients and persons whom he felt would be lonely as dinner guests. It would seem that if this were an attempt to ingratiate himself he would have himself driven her back to the nursing home, and would have followed up with more frequent contacts with her.

TESTIMONY OF GEORGE VARGO

George Vargo was the natural son of Evelyn Komarr, and the objector in the will contest. I indicated immediately after the closing of the testimony in this proceeding that in my opinion George Vargo's testimony was incredible. He testified that he had no memory of his life before he was ten years of age, nor of the adoption which took place when he was six, no memory of attending the Eighth Street School in Milwaukee, or of ever being known as Theodore or "Teddy" Kapitanich.

I am urged to accept the explanation of retrograde amnesia, which I cannot swallow. All of these claims of loss of memory are patently false, especially in view of the evidence of Mary Kramarich, Stephen Vargo and Kathleen Buban, all of whom testified that these matters were frequently discussed in family circles in the presence of George Vargo up until the time of the will contest.

George Vargo, having testified at the will contest that he was the son and sole heir of Evelyn Vargo, must now present some explanation of his false testimony or run the risk of a prosecution for perjury. It will also be noted that he is now legally a nephew of Mrs. Komarr and as such would have to share her estate with his cousins rather than secure it all for himself.

I find that the testimony of George Vargo is demonstrably false and incredible, and that no finding of fact can be predicated thereon unless corroborated by other credible evidence, which, as to material facts, did not occur.

TESTIMONY OF EVA HERKOWSKI

The testimony of this witness was so palpably confused that it was of no value whatsoever, and has been disregarded.

FINDINGS OF FACT

UNDUE INFLUENCE

As previously indicated herein, it is my opinion, and I find as a fact, that the evidence introduced in this case has been sufficient to overcome the inference of actual undue influence. Many witnesses testified who had not testified at the will contest, much more documentary evidence was introduced, and all of the circumstances were more thoroughly explored.

I further find that the will as written embodied Evelyn Komarr's wishes at the time of the alleged execution.

ALLEGED UNPROFESSIONAL CONDUCT

There remains, as the sole issue, the question of whether the conduct of Mr. Beaudry in procuring the drafting and execution of the will at a time when he stood in the confidential and fiduciary position of attorney and conservator was unprofessional and unethical, and was such as to bring the honorable profession of the law into disrepute. I think it was.

A finding that the will was not unnatural and that Beaudry in his contacts with Mrs. Komarr made no efforts to impose his wishes upon her does not absolve him of the charge of unprofessional conduct if in fact the will was drafted by him or by another under his direction, even though he was not physically present at the execution. State v. Collentine (1968) 39 Wis. 2d 325, 159 N.W. 2d 50; State v. Haberla (1968) 39 Wis. 2d 334, 159 N.W. 2d 11; and cases therein cited.

I believe that there can be no doubt that the friendly relationship between Beaudry and Balistrieri, the fact that the scrivener was informed on the way to the hospital as to what the nature of the will would be, the eagerness with which Beaudry examined the will before the scrivener even entered the car, and all the circumstances of the execution, indicate that Mr. Balistrieri was not in fact acting as the attorney for Mrs. Komarr, but was acting as the attorney, friend and agent of Beaudry.

Accepting the premise I cannot avoid a conclusion that the action of Mr. Beaudry was well within the proscriptions of State v. Horan (1963) 21 Wis. 2d. 66, State v. Collentine, supra, and State v. Haberla, supra. The reasons for the rule are clearly

spelled out in Horan, and need no repetition here. In the instant case none of the possible exceptions suggested in Horan were present. This should have been a red stop sign to Beaudry.

The facts in Haberla are surprisingly similar to the facts in the instant case. The differences are only four. In Haberla the attorney scrivener was guardian instead of conservator; there was no substantial estate and he knew it; the will was typewritten by a student who occasionally did typing for the attorney and not handwritten by another attorney; and the defendant in that case was penitent, and did everything he could to right things, whereas the defendant in the instant case not only denies any wrongdoing, but is appealing to the Supreme Court of the United States the ruling on the will.

It is objected by the defendant that he should not be bound by the rule of Collentine or of Haberla because those cases had not been decided at the time the will was drawn. Because of special circumstances there existing, Collentine was merely admonished and the complaint dismissed, but in Haberla decided on the same day, the defendant was reprimanded and required to pay a part of the costs and expenses.

I can see no special circumstances here that would differentiate this case from Collentine as to a finding of unprofessional conduct.

The Court, however, has taken a different view of the conduct here involved. In Haberla, as well as in State v. Eisenberg (1965), 29 Wis. 2d 233, 138 N.W. 2d 235, the will was executed before the decision in Horan, but in neither case was the

conduct of the defendant excused. The chronology was considered only as a matter of extenuation in deciding the extent of the discipline to be imposed.

The Court apparently felt that an innate sense of propriety and a regard for the reputation for integrity, not only of himself, but of other members of the bar, should have been a sufficient deterrent to those defendants.

I agree with this view, and would apply that rule in the instant case, even though the defendant may have been ignorant of the rulings in Horan and Eisenberg, and Collentine and Haberla had not then been decided.

The will contest produced a great deal of adverse publicity, as shown by Exhibit J, clippings from the Milwaukee Journal and the Milwaukee Sentinel, together with tables showing the vast circulation of those newspapers. It is argued that the publicity arises from the nature of the testimony of George Vargo at the will contest, in that he falsely claimed to be the son and sole heir of Mrs. Komarr. This is faulty reasoning since the same publicity would undoubtedly have occurred had it appeared at that hearing that the heirs were in reality nieces and nephews. The publicity resulted instead from the fact that Mrs. Komarr's alleged will left her entire estate to her attorney and conservator, and thus is attributable to the actions of the defendant.

Letters attesting to the standing of Attorney Beaudry from practically all of the judges in Milwaukee County, including reserve judges regularly sitting there, and from all of the judges in Waukesha County have been introduced in evidence, and in

addition a highly respected retired circuit judge appeared voluntarily in court to add his appraisal of Mr. Beaudry's professional standing. This is indeed an imposing array, and it is argued that it should be taken into account in determining whether Mr. Beaudry acted improperly and unprofessionally in this matter. Where, however, as here, the conduct of Mr. Beaudry is clearly established the evidence of prior good character can be considered only with regard to the discipline to be imposed, not as to the facts which have been proved and actually admitted.

RECOMMENDATIONS

The mandate of the Supreme Court imposes upon the referee the unpleasant duty of recommending the action to be taken by the Court. Surely disciplines should be imposed. In making these recommendations I have considered all of the factors bearing upon the question.

I have considered the unblemished record of Mr. Beaudry over a period of nineteen years of practice and the high regard in which he is held by members of the judiciary; the haste which must have appeared necessary to get the will executed in view of the condition of the testatrix, and the consequent lack of opportunity for careful reflection; and Mr. Beaudry's apparent belief that he was in fact carrying out the expressed wishes of Mrs. Komarr.

As bearing upon the question of mulcting the defendant in costs and expenses of this proceeding, I have considered the fact that his law practice is the sole source of support for a large family, and that although no evidence was introduced as to his

financial condition, it seems improbable that a lawyer providing adequately for a family of thirteen would be able to accumulate much property.

On the other hand, it is apparent that Mr. Beaudry has an extensive law practice, since he is well known in all of the courts of two populous counties, as evidenced by the letters of judges, and also that he is financially able to finance an appeal to the United States Supreme Court.

As I see it, object of a disciplinary penalty is three-fold: (1) to make the penalty sufficiently severe to amount to more than a slap on the wrist, (2) to serve as a sign post and deterrent to other lawyers who might be similarly inclined, and thus preserve the high standards of the legal profession, and (3) to bring home to a sometimes skeptical public the fact that unethical and unprofessional conduct of an attorney is not overlooked by the courts or condoned by his fellow lawyers, thus restoring in some measure the reputation for integrity of members of the bar and the confidence of the public in the courts, which are the only bulwark against unbridled license and injustice, which reputation and confidence have been badly shaken by the defendant's conduct.

With these principles in mind, I respectfully recommend that the defendant be required to pay all costs and expenses of this proceeding, including the fees and expenses of the referee and counsel for the plaintiff, and that the defendant be severely reprimanded by the Court.

Respectfully submitted,

/s/ C. Bernard Dillett

C. Bernard Dillett, Referee

DECISION
(Formal Parts Omitted)

ORIGINAL ACTION upon the complaint of the Board of State Bar Commissioners seeking the discipline of the defendant Robert J. Beaudry, an attorney. Adjudged, defendant severely reprimanded and censured.

PER CURIAM. This case arises out of the facts set forth in the Estate of Komarr (1970), 46 Wis. 2d 230, 175 N.W. 2d 473, cert. den. (1971), 401 U.S. 909, 91 Sup. Ct. 867, 27 L. Ed. 2d 806, and the complaint of the Board of State Bar Commissioners dated July 21, 1970, asks this court to impose professional discipline upon Robert J. Beaudry, an attorney, for bringing the legal profession into discredit and for asserting undue influence upon his client Mrs. Komarr, the testator, resulting in a will in which he was named practically the sole beneficiary. Robert J. Beaudry was born in 1920 and was admitted to the practice of law in this state in 1949. He had his office in West Allis and so far as the records in this court show, he has not previously had a disciplinary complaint filed against him. The matter was referred to the Honorable C. Bernard Dillet as referee to hear the testimony and to make recommendations. He found the manner in which Beaudry handled the drafting of Mrs. Komarr's will constituted unprofessional conduct and that it brought the legal profession into disrespect in the judgment of the public. The referee also found Beaudry did not exert undue influence in fact in becoming a beneficiary in the will and recommended that Mr. Beaudry be severely reprimanded and ordered to pay all the costs of the proceeding.

The will was drafted after our decision in State v. Horan (1963), 21 Wis. 2d 66, 123 N.W. 2d 488, but prior to our decision in State v. Collentine (1968), 39 Wis. 2d 325, 159 N.W. 2d 50. In Horan, we held the attorney had no right to jeopardize by the performance of his professional duties the confidence, approval, and esteem of the public which the legal profession needs and has traditionally enjoyed. This was said in reference to the problem in which a lawyer finds himself when asked to draw a will for a friend or a relative who wishes to make a bequest to him or to a member of his family. We adopted the view that when a testator wishes to make his attorney or a member of his immediate family a beneficiary in his will, ordinary prudence requires that the will be drawn by some other lawyer of the testator's own choosing so that any suspicion of undue influence by the lawyer beneficiary is avoided.

We pointed out two exceptions, i.e., a lawyer may draft a will for his wife, his children, or his parents or other close relative in which he is a beneficiary if he stands in the relationship to the testator of one being the natural object of the testator's bounty and the proposed legacy to himself or a member of his family is reasonable and natural under the circumstances or is no more than would be received by law, and no reasonable ground in fact exists for the attorney to anticipate a contest or for the public to have reasonable cause to lose confidence in the integrity of the bar. We also indicated a lawyer might draw a will under circumstances which would give rise to an inference of undue influence if he fully advised his client of the effect thereof and when he was justified in believing there would be independent evidence which would rebut an inference of undue influence.

Those exceptions were qualified in State v. Collentine, supra, for a prospective application as follows: " . . . a lawyer may be the scrivener of a will in which he is a beneficiary only when he stands in relationship to the testator as the natural object of the testator's bounty and where under the will he receives no more than would be received by law in the absence of a will." As the law stands now, a lawyer cannot draw a will for a client, whether a relative or not, in which he or a member of his family is a beneficiary if the bequest amounts to more than what such beneficiary would receive if the client died intestate. This rule avoids all suspicion on the part of the public, whether justified reasonable or not, and assures the public of the integrity of the bar in its professional relationships.

In this case Beaudry cannot qualify under the mofication of the rule because he would have received nothing from Mrs. Komarr by law in the absence of her will. Furthermore, the will disinherited her son George. Consequently, it is his conduct and the manner in which he had the will drafted which must now be examined.

Mrs. Komarr was born Evelyn Vargo on April 18, 1893, in what is now Yugoslavia. At the age of 17 she came to Milwaukee and after a few months engaged in a questionable occupation which she pursued for many years. In 1914 while in a jail in Chicago she gave birth to a child, which was adopted by her sister and was given the name of George. Later in life, Evelyn Vargo married Bruno Komarr, who died early in the 1960's. Upon his death, she suffered a severe change of personality and in 1964 was committed to Milwaukee county's institution for mental diseases; after about six months she was released to her son George Vargo

who took her to live with him in Michigan. While she was in the county institution, a guardianship was instituted and letters of guardianship were issued to George Vargo by the Milwaukee county court. On February 7, 1965, the guardianship was terminated and a conservatorship was established with George Vargo as the conservator at her request. Mrs. Komarr became dissatisfied with her son and returned to Milwaukee and entered Mount Carmel Nursing Home in August, 1965. After some disputes and further dissatisfactions with her son, she petitioned the court for a change of her conservator, asking for the appointment of Robert J. Beaudry whom she had come to know when he represented her in the probate of her husband's will and in two or three lawsuits in which she became involved. While living in the nursing home, she suffered a stroke on March 17, 1968, and was taken to the Misericoidia Hospital in Milwaukee. She died on July 8, 1968, at the age of 75. During her lifetime, Mrs. Komarr was completely illiterate, being unable even to write her own name. Her estate amounted to approximately $50,000 which she inherited from her husband.

Mr. Beaudry learned of the stroke about noon of the day after the stroke occurred. He proceeded to his office and then to the hospital. Mrs. Komarr had a 1963 will in which her son was a beneficiary. While visiting with her, he initiated a discussion of a will and when she indicated she wanted him to have the money, he told her another attorney would have to draft it. He asked her if she wanted him to get another attorney for her and she said yes. He immediately went to the courthouse and conferred with a county judge about the proposed bequest and with the deputy register in probate. He tried to contact Roland J. Steinle, Jr., who had acted as his

attorney in a controversy over the dissolution of a legal partnership. Not being able to reach Mr. Steinle, he called Joseph P. Balistrieri, a young lawyer of limited experience who had also represented him in some minor matters. Mr. Beaudry took Mr. Balistrieri and his sister, who acted as Mr. Balistrieri's secretary, to the hospital after telling him to come prepared with a pad of paper and a pen to make a will.

On the way to the hospital, Mr. Beaudry informed Mr. Balistrieri Mrs. Komarr wanted to make Mr. Beaudry a beneficiary; that she could not write, that she had a son whom she wished to disinherit but he did not tell Mr. Balistrieri that he, Beaudry, was the conservator of Mrs. Komarr's estate. Mr. Beaudry introduced the Balistrieris to Mrs. Komarr and he returned to his office. After conferring with some clients, he returned to the hospital according to prearrangements with the Balistrieris who were waiting for him in the waiting room. Before entering the car, Mr. Balistrieri handed the will to Mr. Beaudry although he had not been instructed to do so by Mrs. Komarr. Mr Beaudry immediately examined it and thereafter kept it in his possession until it was offered for probate.

The referee was of the opinion, and we think rightly so, that Mr. Balistrieri acted as a scrivener for Beaudry and not as an independent attorney for Mrs. Komarr. It is the duty of an attorney who selects another attorney to draw a will for his client in which he is to be a beneficiary, to pick out as competent and as independent an attorney as the client would pick out. Consequently, it was the duty of Mr. Beaudry to instruct Mr. Balistrieri he was

to act as an independent attorney for Mrs. Komarr with no obligations to him and ascertain from her by specific inquiry what her intentions were, the natural objects of her bounty, the value of her property, and all other matters which would be pertinent to her testamentary capacity to make a will and her intentions for the disposition of her property. This is especially important in this case because Mrs. Komarr had just suffered a stroke and was 75 years of age.

Mr. Beaudry's professional obligations were not discharged by the way he secured the drafting of this will even if he were not a beneficiary. It was Mr. Beaudry's duty to provide an attorney, not a scrivener. In the Estate of O'Loughlin (1971), 50 Wis. 2d 143, 183 N.W. 2d 133, we said that one who drafts a will without adequate counseling the testator is a mere scrivener and not an independent legal adviser. Other courts have noted the requirement of independent legal advice may not be met if the scrivener is in fact a close associate of the attorney beneficiary. See In re Will of Moses (Miss. 1969), 227 So. 2d 829; Annot. (1968), Wills: Undue Influence in Gift to Testator's Beneficiary, 19 A.L.R. 3d 575, 598. In Reilly v. McAuliffe (1954), 331 Mass. 144, 117 N.E. 2d 811, it was said advice which is incompetent, perfunctory or given without adequate knowledge of the testator's situation is not sufficient. When the attorney selected by the proposed attorney-beneficiary is a close friend, the rule requires that attorney to meet all the tests for an independent legal attorney selected solely and exclusively by the testator himself. See In re Robbs' Will (1944), 173 Ore. 414, 145 Pac. 2d 808.

It may be Mr. Beaudry thought that under the language of State v. Horan, since he advised Mrs. Komarr he could not draw the will and she asked him to find a lawyer for her, that he was free to hire any lawyer and the fact the will was drawn by another lawyer would be independent, competent evidence which would rebut any inference of undue influence. However, this was a false hope rather than good judgment because Mr. Beaudry knew Mrs. Komarr had a son and even though there was some disagreement between them, the attorney-conservator relationship was of such a confidential nature that the son could reasonably be expected to contest the will, which he in fact successfully did. Nor was the relationship between Mr. Beaudry and Mrs. Komarr such to make reasonable people believe he was a natural object of Mrs. Komarr's bounty, at least not to the extent of practically all her estate. It is true Mrs. Komarr and Beaudry were on friendly terms but that is true of most client-attorney relationships. It is also true Mr. Beaudry had had Mrs. Komarr in his home for dinner, but that likewise is not unusual in client-attorney relationships.

We agree with the findings and conclusions of the referee that Mr. Beaudry was more interested in protecting his interest as a beneficiary of the proposed will than he was in obtaining for his client competent, independent legal advice. Acting as he did brought the profession in disrepute and caused a contest of the will and an appeal.

The referee has concluded on the facts he heard that Mr. Beaudry did not in fact practice undue influence on Mrs. Komarr, in the Estate of Komarr, supra, we held an inference of undue influence

existed and the proof was not sufficient to rebut it; consequently, we ordered that will not to be probated. The conclusion of the referee, whether accepted or rejected, should not and will not affect that will. While the evidence in this case is not substantially different than that in the Estate of Komarr and deals more in detail with the relationship between Mrs. Komarr and her son and with medical testimony concerning her mental capacity at the time she executed the will, we are reluctantly inclined for the purpose of this case only to accept the conclusion of the referee. If Mr. Beaudry were found to have exercised undue influence, an act which involves moral turpitude, he would be subject to suspension, if not disbarment. The referee recommends Mr. Beaudry be severely reprimanded. We agree and we consider the seriousness of this reprimand to be but a notch or a hairline from suspension.

We have been asked to lay down precise guidelines for attorneys to draft wills in which they are to be named beneficiaries. This request presupposes the present cases on the subject are not adequate; we think they are and the basic, general rule is, it should not be done. If the attorneys will read our prior cases on this subject[1] with an unbiased eye, they will find adequate guidelines. An attorney who sees how close he can come at the line of demarcation always runs the risk of overstepping.

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[1] State v. Horan (1963), 21 Wis. 2d 66, 123 N.W. 2d 488; State v. Eisenberg (1965), 29 Wis. 2d 233, 138 N.W. 2d 235; State v. Collentine (1967), 39 Wis. 2d 325, 159 N.W. 2d 50; State v. Haberla (1968), 39 Wis. 2d 334, 159 N.W. 2d 11.

We note in the record letters from some 35 judges commenting on the general good character of Mr. Beaudry. We are at loss to know how letters became evidence in a discipline proceeding. They are not subject to cross examination and should not be in the record. We do not believe judges should become general character witnesses in disciplinary cases unless subpoenaed and certainly the solicitation by a lawyer of 35 judges for character letters is an imposition on the judges and smacks of stuffing the record to impress this court. While we do not hold the giving of a testimonial letter by a judge is unethical, we frown upon the practice and doubt its effectiveness and good taste. General reputation proved by several knowledgeable witnesses of the community subpoenaed for that purpose is one thing; a mass of unsworn, limited individual opinions is something else.

The referee has recommended Mr. Beaudry be assessed all costs in this matter. These now amount to $4,438.28 not including the fees and expenses of the attorney for the Board of State Bar Commissioners; we think the payment of $2,500 toward these costs is sufficient. Therefore, Mr. Robert J. Beaudry is severely reprimanded and censured for his unprofessional conduct in respect to the will of Mrs. Evelyn Komarr and is ordered to pay $2,500 costs within one year.

APPENDIX C

ORDER DENYING MOTION
FOR RE-HEARING

Office of the Clerk - SUPREME COURT
State of Wisconsin

Franklin W. Clarke
Clerk

Madison, Feb. 1, 1972

To Mr. Robert H. Bichler
Racine
Mr. Roland J. Steinle, Jr.
Milwaukee
Mr. Stanley F. Hack
Milwaukee

Sir: -- The Court today announced decision in your case as follows:

St. 78 State v. Robert J. Beaudry

Motion for rehearing denied, without costs.

No opinion filed.

Respectfully yours,
FRANKLIN W. CLARKE
Clerk of Supreme Court.

SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1414

ROBERT J. BEAUDRY,
Petitioner,

vs.

STATE OF WISCONSIN,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Respondent
State of Wisconsin

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of Wisconsin, Respondent, by its attorneys Robert H. Bichler and Warren H. Resh, present this brief in opposition to the granting of the Petition for Writ of Certiorari to the Supreme Court of Wisconsin by Robert J. Beaudry, Petitioner.

OPINION BELOW

The judgment of the Supreme Court of the State of Wisconsin which the Petitioner seeks to have reviewed was entered on December 2, 1971, and is officially reported in

53 Wis. (2) 148, and unofficially in 191 NW (2) 842. It is printed in the Petition herein as Appendix B, p. 24a. Motion for rehearing was denied by the Wisconsin Supreme Court on February 1, 1972. (See Appendix C, p. 33a of the Petition herein.)

JURISDICTION

The Respondent raises no question as to the jurisdiction of this court to consider a Petition for Writ of Certiorari in attorney disciplinary proceedings involving alleged violation of constitutional rights under the United States Constitution.

What the Petitioner is really seeking to attack here are the conclusions of the Wisconsin Supreme Court, and it is strongly urged that no constitutional rights of the Petitioner were violated as clearly appears in the decision and judgment of that court as amply supported by the record herein.

QUESTION PRESENTED

Was a lawyer denied due process and equal protection of the law in an original disciplinary action in the State Supreme Court wherein the lawyer was reprimanded and censured for unprofessional conduct for his part in arranging for the drafting of a will of a feeble illiterate 75 year old testatrix on her deathbed when under the terms of the will such lawyer was named practically the sole beneficiary, and the only son of the testatrix was disinherited, and such will was drafted by a close associate of the attorney-beneficiary with such scrivener being briefed by the beneficiary on the way to the hospital as to the contents of the proposed will and such scrivener made little or no attempt to counsel the testatrix or to give her independent legal advice?

REASONS FOR DENYING [redacted]IT

I. The Standards Utilized By The Wisconsin Supreme Court In Measuring The Petitioner's Professional Misconduct Are Neither Vague Nor Uncertain.

The Petitioner contends that the standards utilized by the Wisconsin Supreme Court in measuring his professional misconduct were vague and uncertain.

On this point the Wisconsin Supreme Court said in its opinion, 53 Wis. (2) 148, 156, reprinted in the Petition herein at p. 31a:

> "We have been asked to lay down precise guidelines for attorneys to draft wills in which they are to be named beneficiaries. This request presupposes the present cases on the subject are not adequate; we think they are and the basic, general rule is, it should not be done. If the attorneys will read our prior cases on this subject/[1] with an unbiased eye, they will find adequate guidelines. An attorney who sees how close he can come at the line of demarcation always runs the risk of overstepping."

In *Horan, supra,* it was held that an attorney has no right to jeopardize the performance of his duties or the confidence, approval, and esteem of the public which the legal profession has traditionally enjoyed. He has a duty not to harm the integrity of the legal profession even though this may call for a personal sacrifice or the omission of acts which are not intrinsically bad. Also his duty of fidelity to his client involves

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[1]/ *State v. Horan* (1963), 21 Wis. (2) 66, 123 NW (2) 488
State v. Eisenberg (1965), 29 Wis. (2) 233, 138 NW (2) 235
State v. Collentine (1968), 39 Wis. (2) 325, 159 NW (2) 50
State v. Haberla (1968), 39 Wis. (2) 334, 159 NW (2) 11.

more that refraining from exercising undue influence *and that the client has a right to full and disinterested advice.*

The failure of the Petitioner here to see that his client, the testatrix, received full and disinterested advice in the drafting of a will in which he was to be named as the principal beneficiary with her only son to be disinherited is the crux of the case.

To avoid the appearance of impropriety the Petitioner employed an attorney who was unknown to the testatrix and who had but little experience in will drafting. The drafting attorney was a close associate of the Petitioner and after being solicited to draw the will was told by the Petitioner on the way to the hospital what the provisions of the will would be. Without any instructions to do so on the part of the testatrix the will was turned over to the Petitioner by the draftsman, and as the Referee found:

> "I believe that there can be no doubt that the friendly relationship between Beaudry and Balistrieri, the fact that the scrivener was informed on the way to the hospital as to what the nature of the will would be, the eagerness with which Beaudry examined the will before the scrivener even entered the car, and all of the circumstances of the execution, indicate that Mr. Balistrieri was not in fact acting as the attorney for Mrs. Komarr, but was acting as the attorney, friend and agent of Beaudry." (See p. 19a of Petition herein)

In other words this is not a case of measuring misconduct by vague and uncertain standards.

Rather it is a question of whether or not the facts established in the record sustain the findings of the Referee which findings were adopted by the Wisconsin Supreme Court.

In *Eisenberg, supra,* there was a will which was unnatural on its face in that an only child was disinherited, and the estate was willed to the offending attorney's mother. The court there found an inference of undue influence under the circumstances and reprimanded the attorney.

In *Collentine, supra,* it was pointed out that when a testator wishes to have his attorney draft a will in which the attorney is entitled to anything more than he would be at law, it is the absolute duty of the attorney to refuse to act and that he has the responsibility of advising the client to consult another attorney. Obviously this must mean another attorney who will owe his undivided allegiance and loyalty to the client and who is not acting as the attorney, friend, and agent of the attorney-beneficiary.

Haberla, supra, completes the above list of cases supplied by the Wisconsin Supreme Court and furnishes ample guidance for all who will read.

In *Haberla* the attorney was the guardian of a 74 year old widower to whom he was unrelated, and the attorney drafted a will dividing the estate between himself and another client also unrelated to the decedent. He was evidently aware of the conflict of interests and breach of fiduciary relationships involved because he took the precaution of having a student type the document and append a statement thereto to the effect that the student had drafted the will.

About the only distinction between that case and the instant one is that here the Petitioner instead of using a student prevailed upon an attorney friend and associate to prepare the document and to act as a witness along with his sister after the Petitioner had briefed them on the way to the hospital to the effect that he was to be the beneficiary and that the testatrix's only son was to be disinherited.

Thus the difference between *Haberla* and the instant case is one of limited degree only and certainly not one of principle, and as was pointed out by the Wisconsin Supreme Court in its opinion here, an attorney who sees how close he can come to the line of demarcation always runs the risk of overstepping. We are not dealing here with some illiterate and underprivileged defendant in a criminal case and to accept the argument of Petitioner to the effect that the standards applied to him were either vague or uncertain is to presume a childlike naivete and artless simplicity utterly foreign to a sophisticated and widely experienced lawyer such as the Petitioner.

II. The Wisconsin Supreme Court Indulged In No Presumption To The Effect That A Lawyer Cannot Function In A Competent Manner And Render Independent Professional Service Because He Has Been Requested To Render Legal Services To A Client Of A Lawyer Friend.

The second argument raised by the Petitioner seeks to convict the Wisconsin Supreme Court of having adopted a presumption that when an attorney who knows that he should not draw a will in which he is to be the beneficiary is precluded from referring the matter to an attorney who happens to be his friend for the reason that such friendship will prevent the second attorney from functioning in an independent and competent manner.

There is absolutely no basis for inferring that the Wisconsin Supreme Court indulged in any such presumption. The decision here is based solely on the facts in the record and not on presumptions.

Any practicing lawyer of extended experience has been confronted with situations wherein he is disqualified from acting because of a conflict of interests and who at the request of the client refers the matter to another attorney who happens to be a friend of the first attorney.

Friendship is not the governing criterion but rather the propriety of what follows depends upon whether the second attorney actually gives his independent advice and undivided loyalty and allegiance to the client rather than to the attorney intermediary who referred the matter to him and who briefed him on what was to be done.

Here in addition to the briefing which Attorney Balistrieri received from the Petitioner on the way to the hospital to the effect that the testatrix wanted the Petitioner to be her beneficiary and wanted to disinherit her only son the Referee states at pp. 10-11 of the Record, State Supreme Court Appendix, p. 109, that:

> "This relationship between the defendant and Mr. Balistrieri leads naturally to the question: In drafting and procuring the execution of the will, was Balistrieri acting as the attorney for Mrs. Komarr or for Mr. Beaudry?
>
> "It will be noted that during this interview with Mrs. Komarr, Balistrieri made no effort to probe the reason why she wished to disinherit her son, nor to inquire as to other relatives to whom she might wish to leave bequests. He apparently accepted without question the statement

which he claims she made that that she wished Mr. Beaudry to have everything, since he had been preconditioned to that response by the information given him by Mr. Beaudry.

"It is my opinion that the adage qui fact per alium, facit per se applied under the circumstances, and Mr. Balistrieri was obviously acting as the agent of Mr. Beaudry, who was eagerly waiting in the wings for the little drama to be completed."

Moreover as the Wisconsin Supreme Court points out in 53 Wis. (2) 148, 153, Mr. Balistrieri handed the completed will to the Petitioner, although he had not been instructed to do so by the testatrix and the Petitioner immediately examined it and thereafter kept it in his possession until it was offered for probate, adding:

"The referee was of the opinion, and we think rightly so, that Mr. Balistrieri acted as a scrivener for Beaudry and not as an independent attorney for Mrs. Komarr. It is the duty of an attorney, who selects another attorney to draw a will for his client in which he is to be a beneficiary, to pick out as competent and as independent an attorney as the client would pick out. Consequently, it was the duty of Mr. Beaudry to instruct Mr. Balistrieri he was to act as an independent attorney for Mrs. Komarr with no obligations to him and ascertain from her by specific inquiry what her intentions were, the natural objects of her bounty, the value of her property, and all other matters which would be pertinent to her testamentary capacity to make a will and her intentions for the disposition of her property. This is especially important in this case because Mrs. Komarr had just suffered a stroke and was seventy-five years of age.

"Mr. Beaudry's professional obligations were not discharged by the way he secured the drafting of this will even if he were not a beneficiary. It was Mr. Beaudry's duty to to provide an attorney, not a scrivener . . ."

The Wisconsin Supreme Court then went on to cite cases from Wisconsin and other jurisdictions to the effect that one who drafts a will without adequate counselling the testator is a mere scrivener and not an independent legal adviser and that advice which is incompetent, perfunctory or given without adequate knowledge of the testator's situation is not sufficient.

Also the following language at p. 154 of 53 Wis. (2) is most significant:

> ". . . When the attorney selected by the proposed attorney beneficiary is a close friend, the rule requires that attorney to meet all the tests for an independent legal attorney selected solely and exclusively by the testator himself. *See In re Lobb's Will* (1944), 173 Or. 414, 145 Pac. 2d 808."

This statement is highly important because it shows very clearly that the Wisconsin Supreme Court did not, as Petitioner contends, indulge in the presumption that an attorney friend to whom a matter such as this is referred cannot act in a competent, independent professional capacity.

The real test as the court made abundantly clear is whether the friendly attorney to whom the matter is referred does *in fact* act as an independent legal adviser by taking the proper steps in questioning the testator as indicated above and by drafting the will in the light of the information which he has independently ascertained rather than on the basis of the briefing he has received from the referring attorney.

Thus, we are dealing here with facts established by the evidence in the record and not on presumptions on matters *dehors* the record as Petitioner would like to believe.

III. The Findings Of Fact By The Wisconsin Supreme Court In An Original Action In That Court Are Not Subject To Review Here If Supported By The Record.

It is interesting to note that the constitutional points raised by the Petitioner were not raised during the hearing before the Referee nor in the Wisconsin Supreme Court prior to the entry of its judgment. It was only as a sort of afterthought that they come into the picture on Petitioner's Motion for Rehearing in the Wisconsin Supreme Court subsequent to its judgment and in an obvious attempt to raise federal questions upon which the Petition for a Writ of Certiorari could be bottomed.

Petitioner in effect is seeking a "trial de novo" here. He is not entitled to this.

The findings of the Wisconsin Supreme Court are fully supported by the evidence as disclosed by the record, and the proper rule to be followed by the United States Supreme Court in the review of attorney disciplinary proceedings was clearly stated by Justice Frankfurter in his dissent in the case of *In re Sawyer* (1959), 360 U.S. 622, 652, 79 S.Ct. 1376, 3 L.Ed. (2) 1473:

> "We are not empowered to set aside the conclusions of the Supreme Court of Hawaii, affirmed by the Court of Appeals, if its conclusions find reasonable support — that is, if conscientious judges could not unreasonably have reached such a conclusion on the strength of the evidence disclosed by the record and the inferences fairly to be drawn from it."

And later in the same dissent at p. 654:

"In examining this record sight must never be lost of the limited scope of our reviewing power. We are only concerned with whether the findings have fair support in the record. If the findings are so supported, we have the right to strike down the suspension only if it transgresses constitutional limits. . . ."

CONCLUSION

The Petition for a Writ of Certiorari herein discloses none of the controlling considerations set forth in Rule 19 for granting such a review, which is done not as a matter of right but only in sound judicial discretion and where there are special and important reasons therefor.

Such Petition should accordingly be denied.

Respectfully submitted,

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